UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL NO. 98-1664-FAB-BJM
	)	CIVIL NO. 98-2344-FAB-BJM
vs.	)	Consolidated Cases
	)	
33.92536 ACRES OF LAND, MORE OR LESS, SITUATED IN VEGA BAJA, COMMONWEALTH OF PUERTO RICO, AND JUAN PIZA BLONDET, AND UNKNOWN OWNERS	)	
	)	
Defendants.	)	

JOINT PROPOSED PRETRIAL ORDER

A. NAMES AND CONTACT INFORMATION OF COUNSEL

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B. STATEMENT OF EACH PARTY'S CLAIMS AND DEFENSES

1. For Plaintiff United States of America:

This action involves two consolidated condemnation cases for the taking of: (1) a leasehold interest in 33.92356 acres of land located in Vega Baja, Puerto Rico (the "Subject Property") from October 1, 1996 through October 31, 1998 (the "Leasehold Interest"), as described in the Declaration of Taking filed in Civ. No. 98-1664; and (2) the fee simple interest, along with a non-exclusive right-of-way access easement, (the "Fee Simple Interest") in the Subject Property, as described in the Declaration of Taking filed in Civ. No. 98-2344. These takings are on behalf of the Federal Aviation Administration ("FAA") and are necessary for the continued operation of a non-directional radio beacon facility that is a critical element of the National Airspace System.

At the time of filing the Declarations of Taking in these actions, along with the deposits of estimated just compensation, title to the property transferred to the United States in accordance with the procedure set forth in 40 U.S.C. § 3114 and Rule 71.1 of the Federal Rules of Civil Procedure. The only issue that remains to be determined at trial is the amount of just compensation owed for the taking of these interests. The United States claims that the total amount of just compensation owed for the takings is (1) $10,600 for the Leasehold Interest, and (2) $200,000 for the Fee Simple Interest and access easement, both of which values are based on the highest and best use of passive recreation and/or farming.

2. For Defendant Juan Piza-Blondet:

The defendant maintains that the subject property can be developed for residential purposes and that sand can be extracted from the same. However, the Court has excluded evidence and witnesses that will support these allegations. The defendant maintains that it is entitled to a jury trial on the issue of just compensation; however, the Court has precluded the same. Hence, the defendant has no evidence that is admissible, according to the Trial Court, on the value of the property, with the exception of some evidence of Carlos Gaztambide.

C. UNDISPUTED MATERIAL FACTS

1. The date of value for the Leasehold Interest is October 1, 1996 to October 31, 1998.

2. The date of value for the Fee Simple Interest is December 2, 1998.

3. From 1958 until the date of taking, the Subject Property was leased continuously by the FAA for the operation of a non-directional radio beacon facility.

4. The FAA Radio Beacon Facility is used by enroute aircraft for navigational purposes when flying in the Caribbean and is a critical element of the National Airspace System.

5. On the dates of value, both the Subject Property and the Main Tract were vacant except for the FAA radio beacon facility, which consists of an antenna, its supporting concrete control room, and an electrical generating system.

6. Under the terms of the lease, the FAA had the right to remove the improvements and infrastructure associated with the FAA radio beacon facility at the end of its tenancy.

7. On the dates of value for both the Leasehold Interest and the Fee Simple Interest, the 34-acre Subject Property was part of a 385-acre tract of land ("Main Tract") owned by the Defendant, Juan Piza-Blondet.

8. The record title evidence shows that on December 17, 1997, Mr. Piza-Blondet segregated a 34-acre parcel from the Main Tract, and that Mr. Piza-Blondet retained ownership of this segregated 34-acre parcel.

9. On the dates of value, the Subject Property and the surrounding Main Tract fell within the Tortuguero Lagoon Hydrographic Basin, a special zoning area designed to control development in order to protect the natural resources in the area.

10. On the dates of value, the Subject Property and Main Tract were zoned B-2 under the Tortuguero Lagoon Hydrographic Basin Zoning Regulations.

11. According to the Zoning Regulations, the B-2 zone designates "Coastal Forests, which include lowlands and wetlands subject to the effects of the tide, usually covered with mangroves."

12. The only permitted uses in a B-2 zone are: (a) shellfish fishing; (b) pedestrian pathways and platforms on pillars for recreational use; and (c) scientific activities and studies. Property subdivision is not permitted in a B-2 zone.

13. On the dates of value, approximately 14 acres of the 34-acre Subject Property consisted of jurisdictional wetlands.

14. On the dates of value, approximately half of the Subject Property was classified as Flood Prone Zone 1 under the Puerto Rico Planning Board Flood Zone Regulations.

15. Under the Flood Zone Regulations, residential development and property subdivision are not permitted in Flood Prone Zone 1.

16. The Subject Property is to be appraised as if vacant.

17. Fair market value is defined as:

> the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective

> date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all economic uses of the property at the time of the appraisal.

18. To determine fair market value, the Subject Property is to be appraised based on its highest and best use.

19. Highest and Best Use is defined as:

> The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum profitability.

20. The Defendant's appraiser, Carlos E. Gaztambide, concluded that the highest and best use for the wetlands portion of the Subject Property was for conservation and/or mitigation, with a value of $9,000 per cuerda.

21. The United States' appraiser, Raul Rodriguez-Lugo, concluded that the highest and best use for the entire Subject Property was for passive recreation and/or farming, with a value of $6,000 per cuerda.

22. In accordance with the Court's August 5, 2008 Order (Docket No. 180), the highest and best use for the Subject Property as of the date of taking was either (1) conservation and/or mitigation or (2) passive recreation and/or farming.

23. In accordance with the Court's August 5, 2008 Order (Docket No. 180), the range of value for the Fee Simple Interest in the Subject Property is between $200,000 and $314,000.

24. The Defendant has not presented any evidence of value for the Leasehold Interest in the Subject Property.

25. The United States' appraiser, Raul Rodriguez-Lugo, concluded that the market rent for the Leasehold Interest was $150 per acre per year, or $10,600.

26. The defendant received the undisputed material fact section to this pre-trial order on August 11, 2008 at approximately 3:11 p.m. CST. Parties have been involved in settlement negotiations for the last two weeks, including but not limited to, August 8, 2008 and August 11, 2008. The defendant disputes the above listed material facts as written. In particular, the defendant appraiser, Carlos Gaztambide's opinions concerning the highest and best use for the subject property have been excluded by this Honorable Court, and his opinions are not limited to those delineated in number 20, above.

D. CONTESTED ISSUES OF MATERIAL FACT

1. For Plaintiff United States of America:

a. The Subject Property is part of a "Larger Parcel" of approximately 385 acres that was owned on the date of taking by the Defendant landowner Juan Piza-Blondet.

b. The "Before and After" methodology is an appropriate appraisal methodology in partial takings cases.

c. The highest and best use of the Subject Property is passive recreation and/or farming.

d. The fair market value for the Leasehold Interest is $150 per acre per year, or $10,600 for the period between October 1, 1996 and October 31, 1998.

e. The fair market value for the Fee Simple Interest as of December 2, 1998 is $6,000 per cuerda, or $200,000.

2. For Defendant Juan Piza-Blondet:

The defendant maintains that the subject property can be developed for residential purposes and that sand can be extracted from the same. However, the Court has excluded evidence and witnesses that will support these allegations. The defendant maintains that it is entitled to a jury trial on the issue of just compensation; however, the Court has precluded the same. Hence, the defendant has no evidence that is admissible, according to the Trial Court, on the value of the property, with the exception of some evidence of Carlos Gaztambide.

E. UNCONTESTED ISSUES OF LAW

1. Just Compensation is the Only Issue at Trial

The only issue to be determined at trial is the amount of just compensation owed for the taking of the Subject Property. United States v. Reynolds, 397 U.S. 14, 20 (1970).

2. Just Compensation Is Not the Value to the Government or the Landowner

Just compensation is neither a question of the value of the property to the landowner, on the one hand, nor its value to the Government on the other. United States v. Petty Motor Co., 327 U.S. 372, 377 (1946); United States v. Miller, 317 U.S. 369, 375 (1943); Olson v. United States, 292 U.S. 246, 256 (1934).

3. Just Compensation Is Measured by the Property's Fair Market Value

The term "just compensation" means the "fair market value" of the property on the date of taking. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984); Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 9 (1984).

4. The Landowner Bears the Burden of Proof

The burden of proof is on the landowner to show the fair market value of the subject property as of the date of taking by a preponderance of the evidence. See United States ex rel T.V.A. v. Powelson, 319 U.S. 266, 273-74 (1943).

5. Fair Market Value

"Fair market value" means the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the date of taking, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the taking. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984); Kirby forest Industries, Inc. v. United States, 467 U.S. 1, 10 (1984); United States v. Reynolds, 397 U.S. 14, 16 (1970); United States v. Miller, 317 U.S. 369, 374-375 (1943); United States v. 125.2 Acres of Land, 732 F.2d 239, 244 (1st Cir. 1984).

6. Larger Parcel

When property taken in a condemnation case is part of a landowner's single, unitary holding, such that there is a unity of ownership and unity of use, then the taken property and the single, unitary holding are to be considered part of a single "larger parcel." United States v. 14.38 Acres of Land, 80 F.3d 1074, 1077 (5th Cir. 1996); United States v. 50.50 Acres of Land, 931 F.2d 1349, 1359 (9th Cir. 1991); see also Baejter v. United States, 143 F.2d 391, 395 (1st Cir. 1944) cert. denied, 323 U.S. 772.

7. Highest and Best Use

Fair market value is to be determined with reference to the property's highest and best use. The term "Highest and Best Use" means the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the near future. The highest and best use cannot be one that is speculative and conjectural, but must be shown to be reasonably probable. Olson v. United States, 292 U.S. 246, 255-256 (1934); National R.R. Passenger Corp. v. Certain Temporary Easements, 357 F.3d 36, 39 (1st Cir. 2004).

8. The Highest and Best Use May Not Be the Use Made by the Government

A proposed highest and best use cannot be a use for which the government is acquiring the property unless there is a prospect and competitive demand for that use by others than the government. See United States v. Chandler-Dunbar Co., 229 U.S. 53, 80-81 (1913); United States v. 320.0 Acres of Land, 605 F.2d 762, 783 n.26, 811 n.107 (5th Cir. 1979).

9. The Court Found that Sand Extraction and Residential Development Are Not Reasonably Probable and Therefore Are Excluded As Speculative and Conjectural Uses.

In accordance with this Court's Order of August 5, 2008 (Docket No. 180), its Order of June 13, 2008 (Docket No. 167), and the Report and Recommendation of Magistrate Judge McGiverin (Docket No. 155), the Defendant has failed to show that its proposed highest and best uses of sand extraction and residential development are reasonably probable. Accordingly, all evidence based on the speculative and conjectural proposed uses of sand extraction and residential development is excluded from trial.

10. The Court Ordered that the Defendant May Only Introduce Opinion Testimony of $9,000 Per Cuerda Based on Conservation and/or Mitigation.

In accordance with the Court's August 5, 2008 Order (Docket No. 180), the Defendant is barred from introducing any opinion testimony other than an opinion of value of $9,000 per cuerda based on the highest and best use of conservation and/or mitigation.

11. The Defendant disputes the summary of relevant jurisprudence as prepared by the plaintiff in this case. The Defendant refers the Court to its pleadings and motions filed in this matter for an analysis of the relevant case law.

F. CONTESTED ISSUES OF LAW, INCLUDING EVIDENTIARY QUESTIONS

1. For Plaintiff United States of America:

a. Any and All Evidence Relating to Sand Extraction or Residential Development Should Be Excluded Under the Court's Prior Orders.

For the reasons stated in this Court's Order of June 13, 2008 (Docket No. 167), as well as the reasons stated in Magistrate Judge McGiverin's Report and Recommendation (Docket No. 155), the United States would object to the Defendant introducing any evidence relating to residential development or sand extraction, on the grounds that such evidence is inadmissible, irrelevant and prejudicial under Rules 402 and 403 of the Federal Rules of Evidence.

b. The United States Would Object to any Offer of Proof or Proffer of Evidence Regarding the Court's Prior Rulings.

The United States would object to the Defendant's offering any proof or proffer of evidence relating to any of the Court's Prior rulings, including but not limited to Docket Nos. 155 and 167, or relating to the proposed highest and best uses of sand extraction and residential development. The Defendant has had a full and fair opportunity to brief the legal issues and present relevant evidence in his responses to the United States' motions (Docket Nos. 132 and 133), and in his objections to the Magistrate's Report and Recommendation (Docket No. 155). Accordingly, the Defendant should not be permitted to supplement the record with any additional, untimely evidence relating to legal issues previously decided by the Court.

c. The Defendant Does Not Have a Constitutional Right to a Jury Trial

There is no constitutional right to a jury trial on the issue of just compensation in a condemnation proceeding. See United States v. 5.00 Acres of Land, 673 F.2d 1244, 1247 n.1 (5th Cir. 1982); Georgia Power Co. v. 138.30 Acres of Land, 596 F.2d 644, 647 (5th Cir. 1979). Rule 71.1(h) of the Federal Rules of the Civil Procedure establishes that "In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined . . . by a jury when a party demands one within the time to answer . . . unless the Court appoints a commission. See Fed. R. Civ. P. 71.1(h)(1)(B). It is clear from the text of the rule that this Court has the discretion to set a jury trial or a bench trial. See United States v. Delaware, Lackawanna & Western Railroad Co., 264 F.2d 112, 114-115 (3rd Cir. 1959); see also Sykes v. United States, 392 F.2d 735, 740 (8th Cir. 1968).

In this case, the Defendant has made repeated efforts (see Docket Nos. 170, 177) to introduce new and previously undisclosed testimony in defiance of this Court's June 13, 2008 Order (Docket No. 167). Because of the Defendant's inability and/or an unwillingness to follow the Court's clear instructions regarding the admissibility of evidence, the United States contends there is considerable risk that the Defendant's witnesses may testify to inadmissible evidence (intentionally or not) at trial. In order to eliminate the undue prejudice that would result from the jury hearing this inadmissible evidence, the Court has properly exercised its discretion to hold a non-jury trial on the issue of just compensation.

d. The Before and After Method is an Appropriate Appraisal Methodology in This Case.

Because the Subject Property is part of a larger parcel, an appropriate methodology to determine just compensation is the "Before and After" method, in which the fair market value of the larger parcel is determined before the taking, and the fair market value of the remainder is determined after the taking. See United States v. Virginia Elec. Co., 365 U.S. 624, 632 (1961); United States v. 8.41 Acres of Land, 680 F.2d 388, 392 n.5 (5th Cir. 1982). The difference between these two values will be just compensation. See United States v. Miller, 317 U.S. 369, 376 (1943).

2. For the Defendant Juan Piza-Blondet:

The defendant maintains that the subject property can be developed for residential purposes and that sand can be extracted from the same. However, the Court has excluded evidence and witnesses that will support these allegations. The defendant maintains that it is entitled to a jury trial on the issue of just compensation; however, the Court has precluded the same. Hence, the defendant has no evidence that is admissible, according to the Trial Court, on the value of the property, with the exception of some evidence of Carlos Gaztambide.

H. WITNESSES (OTHER THAN FOR REBUTTAL OR IMPEACHMENT)

1. For Plaintiff United States of America:

a. Raul Rodriguez-Lugo.

Mr. Rodriguez-Lugo is an appraiser who will offer expert opinion testimony consistent with his written appraisal reports about the highest and best use and fair market value of the Subject Property. Mr. Rodriguez concluded that (1) the taking of the Fee Simple Interest constituted a partial taking from a 385-acre larger parcel; (2) the "Before and After" methodology was the appropriate appraisal method to value the Fee Simple Interest; (3) the highest and best use of the Subject Property was passive recreation and/or farming; (4) the market value of the Fee Simple Interest, based on the comparable sales approach, was $200,000; and (5) the market rent owed for the Leasehold Interest is $150 per acre per year, or $10,600.

2. For Defendant Juan Piza-Blondet:

A. Carlos Gaztambide will offer a value based on mitigation and conservation. Sections of his report outline that the wetland portion of the property is worth approximately $9,000 per acre. Mr. Gaztambide will also testify that the before and after method of evaluating the property does not apply. Mr. Gaztambide has been precluded by the court in offering any other opinions concerning the development of the land or sand extraction from the same.

B. Juan Piza-Blondet will testify as to the value of the land based on mitigation and conservation. Mr. Piza has been precluded by the court from offering any other opinion or factual evidence concerning value of the subject property.

C. Raul Rodriguez-Lugo will testify on cross-examination concerning before and after method of evaluating the subject tract.

I. DOCUMENTS AND ITEMS TO BE OFFERED AS EVIDENCE

1. For Plaintiff United States of America:

Exhibit	Description
1	Planning Board Regulations for the Tortuguero Lagoon Hydrographic Basin
2	Management Plan for the Tortuguero Lagoon Hydrographic Basin
3	Raul Rodriguez Appraisal Report for Fee Simple Interest
4	Raul Rodriguez Appraisal Report for Leasehold Interest
5	Gonzalo Ferrer Appraisal Report for Fee Simple Interest
6	Raul Rodriguez Resume
7	Zoning Map from Rodriguez Appraisal depicting location of properties that failed to obtain zoning change
8	Geologic Map from Rodriguez Appraisal depicting location of properties that failed to obtain zoning change
9	Flood Zone Map from Rodriguez Appraisal depicting location of properties that failed to obtain zoning change
10	Comparable Sales Chart from Rodriguez Appraisal
11	Comparable Sales Comparison Table from Rodriguez Appraisal
12	Maps of Comparable Sales Locations from Rodriguez Appraisal
13	Survey Plat from Declarations of Taking
14	Uniform Appraisal Standards for Federal Land Acquisitions
15	Uniform Standards for Professional Appraisal Practice
16	Satellite Photo with overlay of Main Tract and Subject Property
17	Satellite Photo with overlay of Main Tract, Subject Property, and location of comparable sales
18	Satellite Photo with overlay of Main Tract, Subject Property, and location of properties that failed to obtain zoning change
19	Zoning Map with overlay of Main Tract and Subject Property
20	Zoning Map with overlay of Main Tract, Subject Property, and location of comparable sales
21	Zoning Map with overlay of Main Tract, Subject Property, and location of properties that failed to obtain zoning change

22	Map of Tortuguero Lagoon Hydrographic Basin with overlay of Main Tract and Subject Property
23	Map of Tortuguero Lagoon Hydrographic Basin with overlay of Main Tract, Subject Property, and location of comparable sales
24	Map of Tortuguero Lagoon Hydrographic Basin with overlay of Main Tract, Subject Property, and location of properties that failed to obtain zoning change
25	Flood Prone Zone Map with overlay of Main Tract and Subject Property
26	Flood Prone Zone Map with overlay of Main Tract, Subject Property, and location of comparable sales
27	Flood Prone Zone Map with overlay of Main Tract, Subject Property, and location of properties that failed to obtain zoning change
28	Geologic Map with overlay of Main Tract and Subject Property
29	Geologic Map with overlay of Main Tract, Subject Property, and location of comparable sales
30	Geologic Map with overlay of Main Tract, Subject Property, and location of properties that failed to obtain zoning change
31	Data Sheet for Rodriguez Comparable Sale 1
32	Data Sheet for Rodriguez Comparable Sale 2
33	Data Sheet for Rodriguez Comparable Sale 3
34	Data Sheet for Rodriguez Comparable Sale 4
35	Data Sheet for Rodriguez Comparable Sale 5
36	Data Sheet for Rodriguez Comparable Sale 6
37	Data Sheet for Rodriguez Comparable Sale 7
38	Definition of "Fair Market Value"
39	Definition of "Highest and Best Use"
40	Definition of "Larger Parcel"
41	Definition of "Fee Simple Interest"
42	Aerial Photographs of Subject Property
43	Aerial Photographs of Comparable Sales

II. For the defendant, Juan Piza-Blondet

1. The exhibits listed and identified by the plaintiff and not objected to by the defendant at trial.

2. Excerpts from the report of Carlos Gaztambide regarding the value of the property based on mitigation and conservation.

3. The report and photographs of Gregory Morris and/or E.A. Environmental.

4. The deposition of Carlos Gaztambide and corresponding exhibits – to be introduced as

proffered evidence in lieu of live testimony.

5. The deposition of James Joyce and corresponding exhibits – to be introduced as proffered evidence in lieu of live testimony.

6. The deposition of Julio Toro McCowen and corresponding exhibits– to be introduced as evidence in lieu of live testimony.

7. The appraisal report prepared by Ivan Canino.

8. Color photographs of the subject property.

9. Aerial photographs of the subject property.

J. CLAIMS OR DEFENSES THAT ARE WAIVED OR ABANDONED

The Defendant has not challenged the United States' authority to condemn the Subject Property in an Answer filed within the period set forth under Rule 71.1(e)(2), and therefore has waived any objection or defense to the taking. See Fed. R. Civ. P. 71.1(e)(3) ("A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed").

K. PENDING MOTIONS

There are no pending motions.

L. LENGTH OF TRIAL

The United States estimates that presentation of its case at trial will require 4 hours.

M. TRIAL DATE

Trial is set to begin August 18, 2008 at 9:00 a.m.

Undersigned counsel conferred with counsel for the Defendant, who provided inserts for the Defendant's portion of the Proposed Pretrial Order.

Respectfully submitted this 11th day of August, 2008, by:

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